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October Term, A. D., 1899.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

WILLIAM H. TOMPKINS, W. T. LA FOLLETTE AND ALEXANDER KIRKPATRICK, CONSTITUTING THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF SOUTH DAKOTA, ET AL.

APPELLANT'S BRIEF IN REPLY.

GEORGE R. PECK,
A. B. KITTREDGE,
Solicitors for Appellant.

PRESS OF E. V. MUDGE.

IN THE

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APPELLANT'S BRIEF IN REPLY.

Counsel for appellees have filed a brief of 191 pages in support of the decree below. Very little if any of it requires attention upon our part. We do not feel called upon to point out, what must be so apparent to the court, that it lacks the logical coherency which is necessary if it is expected that it will aid the court in its investigations of the questions involved. The testimony is all embodied in the record, and there can be no dispute as to what it is.

Counsel for appellees draw some conclusions from it which are clearly unwarranted, and also make some criticisms upon the estimates of appellant's witnesses, but their conclusions and their criticisms are made nugatory by the concessions which they have been forced to make by the overwhelming strength of the testimony against them. In this case, as in *Smyth vs. Ames*, the controlling question is that of the relation which the local operating expenses bear to the local earnings. Whether the value of the property used be large or small, the practical inquiry is: What are the net results of its operation? As we pointed out in our brief, it is not difficult to determine with entire accuracy:

(1.) The entire earnings of the railroad system as a whole.

(2.) The entire operating expenses of the system as a whole, and what percentage these operating expenses are of the entire earnings.

(3.) The entire local earnings within the State of South Dakota.

These three easily ascertainable items leave a fourth, namely, the local operating expenses in South Dakota. They are to be ascertained, and can only be ascertained, by comparisons based upon experience, by the opinions of expert witnesses, and by an analysis of the expenditures which must necessarily be made in conducting the local operations. All these methods of determining the amount of local operating expenses were followed with the most painstaking care by complainant, and the

result is that it is conclusively proven that the local operating expenses in South Dakota have been, and necessarily must be, much larger than the operating expenses of the system as a whole.

The lowest amount which, under the testimony, can be assumed as local operating expenses, is 85 per cent of the earnings, and it is very plain that, in fact, they amount to much more. Not only is the proof clear and unanswerable on this point, but counsel for appellees do not pretend to controvert it. Nowhere in their brief is it denied that local operating expenses are greater than system operating expenses. On the contrary they frequently distinctly admit it.

Speaking of the testimony of Mr. Truesdale, who had testified that assuming the system operating expenses to be only 60 per cent, the local operating expenses in South Dakota would amount to 85 or 90 per cent. (Rec. 327), counsel on page 154 of their brief, say:

> "The witness does not say that the cost would be 85 to 90 per cent of the $102,289.23 revenue from local freight, but that it would be 85 to 90 per cent of all the business, to wit: The total revenue of $1,074,741.86. This would mean that the freight would cost about $850,000 to $900,000. *This is a little less than Mr. Earling's estimate, and a little more than our estimate, and considering that Mr. Truesdale was expressing an opinion and, not testifying from positive knowledge, he has come very close to the facts.*"

It is creditable to the candor of counsel, that they have not wasted time in an effort to dispute the plain effect of the testimony upon this branch of the case. It is, however, interesting to note the comments of counsel on Mr. Truesdale's testimony. They inform the court that:

> "The witness does not say that the cost would be 85 to 90 per cent of the $102,289.23 revenue from local freight, but that it would be 85 to 90 per cent of all the business, to wit: The total revenue of $1,047,741.86."

This latter sum consists of the local freight earnings in the State of South Dakota for the year 1897, and a mileage proportion of all the interstate freight business done in the State. Just what force there is in counsel's observations we do not perceive, for it is very certain that if the operating expenses for the *entire* freight business in South Dakota, local and interstate, amount to 85 or 90 per cent, the operating expenses on the strictly local business will be as much, and probably a little more.

A large portion of the brief for appellees is devoted to a criticism of the figures and estimates of Mr. Earling, Mr. Whittemore, and Mr. Bates. We can say nothing which will point out more clearly than it now appears from the testimony of these gentlemen, that they were fair, intelligent, capable, and honest witnesses. Appellees introduced testimony on rails, ties, and buildings. On rails, their witness was Professor Whitney, of the Wisconsin State

University, who flatly contradicts Mr. Earling, Mr. Chappell, Mr. Harahan, Mr. Truesdale, and Mr. Harris on the question of the average life and usefulness of a steel rail. These latter gentlemen are all practical railroad men of many years experience, are now engaged in the operation of great lines of railroad, and are constantly dealing with the subject about which they were examined, and their testimony shows that the average life of a steel rail is about 16 years. (Rec. pps. 226, 314, 337, 338, 347, 596, 644, 645, 646.) Professor Whitney, on the contrary, testifies that the average life of a rail is from 32 to 50 years (Rec. 877). It is very evident that someone is mistaken on this subject, and we submit that it is much more likely to be the Professor than the five practical railroad men whose testimony he contradicts.

As to buildings, apellees introduced as a witness R. J. Booth, a contractor of Sioux Falls, whose testimony placed the cost of constructing buildings at about 30 per cent less than the testimony of Mr. Bates, but his figures were based entirely upon present prices and do not pretend to dispute the original cost as testified to by Mr. Bates.

The criticism of counsel upon complainant's testimony is well illustrated by what they say about the item "Material on hand," which Mr. Whittemore, the chief engineer, placed at $300 per mile. Counsel cite the annual reports for 1896 and 1897 of complainant, which give for material on hand in 1896, $1,846,511.36, and in 1897, $1,911,287.76. Counsel divide these amounts by a mileage of

7,866.88, or 1,700 miles more than the entire mileage of main track, which was the basis upon which Mr. Whittemore found that material on hand was $300 per mile. (See testimony of Mr. Whittemore, Rec. 421, 422; also Exhibit No. 2, page 6.)

Counsel complain that they did not have access to the records of the company; that they were in our possession and ought to have been produced for their inspection. To show how groundless is this complaint it is only necessary to refer to the Record, page 22, which shows that at the very first day upon which testimony was taken, and while Mr. Winne, the general auditor and custodian of the records which bear upon earnings and disbursements of all kinds, was testifying, the following entry was made:

> "Counsel for complainant now states that all the books, records, papers, documents in the office of the general auditor, in respect to which testimony has been given by Mr. Winne, are in his office in this building and will be produced here at any time while the testimony is being taken at the request of counsel for the defendants."

Throughout the entire taking of testimony free access was given to counsel for defendants to records, statistics, books, and documents, and every facility was accorded them promptly upon demand, and we must confess to some surprise that they make any complaint on this score.

Counsel, on page 188 of their brief, refer to the income account, which they conceive to be cash profits on hand, as a surplus in money put aside

from the earnings of the system after paying operating expenses, fixed charges and dividends. Counsel had a full explanation of this account in the testimony, and understood perfectly that it was not at all what they claim it to be in their brief. Of the amount named ($8,509,719.85), $2,500,000 had been paid in the last dividend, prior to the taking of the testimony, the balance represents the amount necessary for a sinking fund with which to redeem bonds, and the amount locked up in supplies, fuel, and necessary working capital, which every railroad company must have. Mr. Winne's testimony fully explains it, as follows:

> "Counsel has inquired in regard to the surplus earnings of the company. You may explain in detail regarding that fund.
>
> "A. The surplus shown by the balance of income account June 30, 1897, amounts to some eight and one-half million dollars and is the accumulation of what we call undivided income from the formation of the company to this time. Of that amount some two and one-half million dollars have been divided since this report, being the dividend for the last half of the fiscal year ending June 30, 1897, which dividend was not declared until after the accounts were closed, and in this case the dividend was declared in October, 1897. The balance of the surplus, as I explained, is the growth since 1863, and includes all working capital which all roads must have in order to do business. For instance, we have one million nine hundred and eleven thousand dollars locked up in material, fuel, and supplies, for the operation of the road,

which is kept constantly on hand; also provision for purchase of bonds for sinking fund; a large amount has been expended on property from 1863 to this time, for which the treasury could not be reimbursed, and which the earnings account would have to stand, and which must eventually be taken out of the surplus account.

"Q. You have spoken of the working capital or supply account. Explain in detail what that is. Why is it necessary, if such is the fact, for the operation and proper management of the company to keep this account?

"A. The account of fuel and materials on hand includes materials of all kinds, rails, ties, lumber, also steel, copper, wheels, axles, and everything that is used in the operation and construction. We are obliged to keep a large amount of fuel on the western lines to be prepared in case of snow blockades, when we are not able to get coal. The material comprises everything which may be needed.

"Q. How about lumber and bridge timber?

"A. It is included in the account.

"Q. You have spoken of the sinking fund. Explain what that is?

"A. Certain of our mortgages provide that a certain number of bonds must be redeemed each year. The Dubuque Division bonds and the Wisconsin Valley Division bonds I have in mind now.

"Q. And this sinking fund is a sum of money set apart to redeem the bonds as they become due on the mortgage contract?

"A. Set apart to redeem these bonds."

(Rec., 164, 165.)

We mean no disrespect to counsel when we say that in their brief they do not seem to have at all appreciated the real issue. The question which the court below was called upon to answer was: Will the rates prescribed by the South Dakota Board of Railroad Commissioners admit of the complainant earning "such compensation as, under all the circumstances, is just to it and to the public?" We have shown by the testimony what the local earnings in South Dakota were for the four years prior to the filing of the bill, and the court has found in its decree that we showed such earnings correctly. We have shown that the operating expenses of complainant's system were, during the four years named, never less than 60 per cent and in one year were over 64 per cent. We have shown, and it has not been disputed, that these operating expenses of the system were a very fair, and even low per cent. We have shown that taking a per cent lower than any of them, namely 60 per cent, the operating expenses on the local business of South Dakota can not be less than 85 per cent, and are undoubtedly more. Counsel distinctly admit this, and the proof overwhelmingly esfablishes it. This, then, leaves only the question: What would the prescribed rates produce in the way of net earnings? The answer is: Nothing. That it to say, the court below has held, in effect, that a rate which does not permit a carrier to earn anything, is a reasonable one.

The court below was content to conclude its computations with the gross earnings, and the percentage they bear to the assumed local capital, and did not stop to inquire whether complainant would have

anything left after paying the necessary operating expenses. Table No. 2, on page 51 of our brief, merely completes the computations which the court below left in an unfinished state, and the result—and it is a result from which there is no escape—is a loss for each year, of the four years upon which the court below made its calculations.

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